United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-7042

To be argued by
SAM RESNICOFF

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

ELLIOTT H. VELGER,
Plaintiff-Appellant,

against

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF-APPELLANT'S BRIEF

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249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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ELLIOTT H. VELGER,

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On Appeal from the UNITED STATES DISTRICT COURT for the SOUTHERN DISTRICT OF NEW YORK.

PLAINTIFF-APPELLANT'S BRIEF

Preliminary Statement

This is an appeal from an order and judgment made and entered on December 10, 1974, after a non-jury trial before United States District Judge HENRY F. WERKER which dismissed the complaint and granted judgment to defendants (pp. 151a,153a).

THE FACTS

Prior to January 30, 1970, the New York City Civil Service Commission advertised an open written competitive examination for the position of PATROLMEN, POLICE TRAINEE, Police Department, City of New York. The Civil service announcement

provided as follows (pp. 22a,48a-49a):

> "This examination is open only to men. A single list will be established from this examination and appointments will be made to either Patrolman or Police Trainee (Police Department) depending on age.
>
> Police Trainee is a trainee class of positions. A Police Trainee will receive a regular appointment as a Patrolman on reaching his 21st birthday, or as shortly thereafter as practicable, without taking any further written or physical tests, provided he has a satisfactory record as trainee and provided he passes a medical test identical to the one given to Patrolman candidates."

Appellant successfully passed the written examination and the medical and physical tests. Before he was placed on the eligible list, the Civil Service Commission as required by law investigated appellant's background, school records, employment records, etc., and having found appellant to be eligible, certified his name as qualified for appointment. The Police Department then conducted its own investigation. On January 30, 1970, appellant was appointed from the eligible list to the position of Police Trainee (pp. 91a, 48a-49a).

On August 8, 1972, appellant became twenty-one years of age (49a,91a). On August 15, 1972, appellant was promoted to the position of Patrolman.

To digress from the factual presentation, it was the contention of appellant before Judge GURFEIN that since the

civil service announcement for the position (p. 22a) provided "a Police Trainee will receive a regular appointment as a Patrolman on reaching his 21st birthday, or as shortly thereafter as practicable, without taking any further written or physical tests"***, appellant's appointment on August 15, 1972 was permanent. Judge GURFEIN although commenting that the notice could have been clearer (34a), referred to another provision in said notice which provided "those appointed as probationary Patrolman must serve a probationary period" ***.

On February 16, 1973, appellant received the following written notice (10a):

> "You are hereby notified that the Police Commissioner of the City of New York has decided not to retain you as an employee of the Police Department, your capacity having been unsatisfactory to the Police Commissioner".

Appellant was not served with written charges and was not given a hearing.

In his request for interrogatories (78a), appellant requested the following information:

> "Set forth all the reasons why the Police Department terminated plaintiff on February 16, 1973, inasmuch as plaintiff was continuously employed by the Police Department since January 31, 1970".

In their reply (80a), defendants stated:

> "This interrogatory is objectionable in that plaintiff was employed as a probationary

> [illegible] policeman at the time of his termination and hence has no right to a statement of reasons for his termination".***

In response to defendants interrogatories, appellant set forth at length all of the government, state, and city civil service examinations which he took and passed (72a-75a). In his affidavit (40a-44a), appellant set forth in detail his inability to obtain employment in government and in the private sector because of his dismissal from the Police Department. Appellant stated as follows (42a-43a):

> "I was terminated by the PENN-CENTRAL RAILROAD POLICE DEPARTMENT because of my record of employment in the Police Department, City of New York. I do not know what is in my personnel file. I have never seen nor have I ever been advised of any derogatory matter being placed in my file. I was never given an opportunity to reply or to rebut any such statements. Under the circumstances, since I am being deprived of my right to earn a living, I respectfully submit that the action of the Police Department, City of New York, in failing and refusing to divulge to me the reasons for my dismissal and give me an opportunity to reply to any derogatory matter, is in violation of my constitutional rights to due process".

THE TRIAL

At the rial, the defendants produced a Mr. O'BRIEN who was employed as the administrative manager with the New York City Police Department "at present assigned to the Personnel Records Division" (129a). On direct examination, the following testimony was elicited (130a-131a):

"Q What does the police department do with regard to request for information as to termination?

A The request for information as to reason for termination is never given out.

Q To anybody?

A Other than policy agencies. It has to be a Governmental agency like Park Police, Government Police. If they are investigating for background, they are advised to appear at the area and we will give them such information as we consider necessary for them to make a determination.

Q Do they have to have an authorization to obtain that information?

A Not if it is a Government police agency.

Q How about if it is a non-Government police agency?

A The information is not given to them.

Q Not given to anyone.

A That's right."

This testimony is extremely significant in view of appellant's testimony that he took over a hundred civil service examinations (109a), and passed the examinations "many of them with high marks" (96a).

Although the witness O'BRIEN called by defendants testified under oath that termination records of Police candidates were not made available and were not given to non-Government police agencies, his testimony was not true. To put it mildly, the witness O'BRIEN was "mistaken". ROBERT J. STEELE called as

a witness by appellant, testified he was the Captain of Police, Commanding Officer at Pennsylvania Station, New York, Penn Central Railroad Station Police (111a), and that based upon a report submitted by LT. RONNY E. HAMILTON (now Captain) of his Staff after inspecting and reviewing the Police Department files relating to appellant's termination, appellant was terminated. The witness also testified that appellant's "personnel evaluation reports were good" (113a).

LONNIE HAMILTON employed as a night Captain with the Penn Central Railroad Police testified that appellant filled out a form which authorized the witness to get his records at the Police Department (115a), and further testified (115a-116a):

> "Q Now, first with respect to the quality of his work, working for Penn Central, was it satisfactory?
>
> A So far as I know it was very good."

On the very crucial issue as to the contents of the Police Department records pertaining to appellant's dismissal, Captain HAMILTON testified (117a-119a):

> " Q Did he sign it?
>
> A Yes, sir.
>
> Q Then what did you do with it?
>
> A Two days later I went back to police headquarters and delivered it to the sergeant on duty at the office, and looked through his personnel record.

Q You looked through the records?

A Yes, sir.

Q Tell us what was the reason for the dismissal from the Police Departmen

A From the New York City Police Department?

Q Yes.

A It occurred in the Police Academy, Velger was on probation with the New York City Police Department. It was involving approximately four or five individuals.

Q Other patrolmen?

A Other patrolmen. And supposedly one of the officers reported that Patrolman Velger--

MR. HERZOG: Excuse me. Is this what he said or is this what was in the records?

MR. RESNICOFF: What was in the records.

A This is what was in the records, sir.

MR. HERZOG: In the records, all right.

A That patrolman Velger had stuck a service revolver to his head in an apparent attempt to commit suicide.

Q Did they permit you to make copies of the reports or that was not permitted?

A I did not make copies of the reports. I took notes from the file.

Q Then you came back and reported that to your superiors or whoever it was?

A No, sir. I then tried to verify it.

Q You did not try to verify it?

A I tried to verify the information in his service file.

Q And what happened?

A I drew a negative attitude from the New York City Police Department. They advised me to go about it by letter. I explained to them that I had already attempted to do it by letter, and I gave up.

Q As a police officer were you satisfied with that report?

A No, sir.

Q They wouldn't permit you to investigate or talk to hese other policemen that were involved there, the other probationary patrolmen, is that correct?

A No, they wouldn't permit it. I just drew a blank attitude from the New York City Police Department. I decided that I could never prove or disprove exactly what happened, so I let it go as it stood.

Q Then what happened after that, when you came back to your headquarters?

A After that? I returned to my boss and advised him of my findings, and I told him that under the circumstances I would recommend that Patrolman Velger be terminated.

Q And he was terminated?

A Yes, sir.

MR. RESNICOFF: You may examine.

THE DECISION BELOW

The Judge below made several findings (149a-150a).

One of those findings was:

> "***On doing so Captain Hamilton was given the personnel file, from which he gleaned that plaintiff had been dismissed because while still a trainee he had put a revolver to his head in an apparent suicide attempt."

The Judge was in error. This was an improper finding. The Court merely repeated what Captain HAMILTON saw in the report. Furthermore, Captain HAMILTON testified (118a) he was not satisfied with the report. This is the very thing appellant is complaining about. If the Judge erroneously accepted that finding as a fact. it would follow that a lay person looking at said report would also reach the same conclusion. The Court also erroneously concluded that appellant did not establish "that information about his Police Department service was publicized or circulated by defendants in any way that might reach his prospective employers." Appellant made no claim that defendants publicized, circulated or advertised the reasons for his summary dismissal. The mere existence of the adverse, derogatory and stigmatic report which was available for inspection and review by prospective employers and agencies, operated to the immediate prejudice, damage and detriment of appellant and prevented him from earning a livelihood and securing comparable employment.

POINT I.

THE SUMMARY DISMISSAL OF APPELLANT WITH MORE THAN THREE YEARS OF CONTINUOUS SERVICE WITH THE POLICE DEPARTMENT, CITY OF NEW YORK, WITHOUT STATED CHARGES AND WITHOUT A HEARING, WAS IN VIOLATION OF HIS PROCEDURAL AND SUBSTANTIVE RIGHTS TO DUE PROCESS AND THE EQUAL PROTECTION OF THE LAWS.

Appellant is twenty-three years of age, single, and

resides with his parents (90a). He commenced employment as a Police Trainee on January 30, 1970. His employment with the Police Department was continuous until his summary dismissal on February 16, 1973, which was accomplished without charges and without a hearing (92a).

In LOMBARD v. THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, 502 F. 2d 631, Judge GURFEIN writing for this Court in reversing TRAVIA, J. (E.D.N.Y.) held:

> "The distinction taken by the Court in ROTH is that where the appellant's 'good name, reputation, honor, or integrity is at stake' or 'the State, in declining to re-employ (the respondent), imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities,' 408 U.S. at 573, he may claim a deprivation of "liberty' under the due process clause of the fourteenth amendment. A charge of mental illness, purportedly supported by a finding of an administrative body, is a heavy burden for a young person to carry through life. A serious constitutional question arises if he has had no opportunity to meet the charge by confrontation in an adversary proceeding. Cf. BIRNBAUM v. TRUSSELL, 371 F. 2d 672 (2d Cir. 1966) (accusation of racial bias)." (emphasis supplied).

Where an adverse action is taken which generates a deprival of an individual's rights to due process and the equal protection of the laws, such adverse action is unconstitutional. Any adverse action which seriously affects property rights must be fundamentally fair and rational. It may not be unduly oppressive, unreasonable and in derogation of one's rights to

earn a living. There is no better way to generate the feeling that justice has been done than to give a person, healthy or sick, rich or poor, whose life, liberty or property is in jeopardy, notice of the charges against him and an opportunity to meet the same.

Recently, Mr. Justice FEIN, sitting in Special Term, Part I, New York County (N.Y.L.J., November 20, 1974) in a much publicized and luminous opinion, after reviewing recent due process decisions, concluded that a provisional employee (with no civil service status) could not be summarily dismissed without a hearing.

The due process clause requires notice and an opportunity to be heard. The constitutional guarantee of procedural due process attaches when there is a governmental deprivation of a legitimate property interest. Once this threshold has been crossed, the opportunity to be heard is constitutionally mandated (see, eg. Fuentes v. Shevin, 407 U.S. 67; Bell v. Burson, 402 U.S. 535; Wisconsin v. Constantineau, 400 U.S. 433; Goldberg v. Kelly, 397 U.S. 254; Sniadach v. Family Finance Corp., 395 U.S. 337).

Appellant was dismissed from his position of "probationary" Patrolman (10a). Since appellant was a Patrolman, his dismissal gave rise to a stigma of criminality.

Tenure, status, deprivation of a position and wages affect liberty and are property. A Patrolman is a Peace Officer and a Law Enforcement Officer. Dismissal from such a position is a stigma- a disability that will affect the individual's freedom to take advantage of other employment opportunities (Cornell v. Higgenbotham, 403 U.S. 207,208), and therefore clearly permits appellant to invoke the panoply of due process procedural protection. Although due process tolerates variances in the form of a hearing (Mullane v. Central Hanover, 339 U.S. 306, and Boddie v. Connecticut, 401 U. S. 371), opportunity for that hearing must be provided before the deprivation at issue takes effect (Bell v. Burson, 402 U.S. 535; Wisconsin v. Constantineau, 400 U. S. 433; Armstrong v. Manzo, 380 U.S. 545 and Burton v. Wilmington Parking Authority, 365 U.S. at p. 726).

In Stuart v. Palmer, 74 N.Y. 183, the New York Court of Appeals held:

> "'Due process of law', is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature***This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights."
>
> And the Court went on to say:
>
> "It may however be stated generally that due process of law requires an orderly

> proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard and to defend, enforce and protect his rights. A hearing or an opportunity to be heard, is absolutely essential. We cannot conceive of due process of law without this."

Appellant maintains pursuant to the civil service announcement (22a), that when he was appointed a Patrolman on August 15, 1972, shortly after he attained his twenty-first birthday, his status was not on probation but on a permanent basis. Schedule "B", (22a) clearly and expressly provided "A Police Trainee will receive a regular appointment as a Patrolman on reaching his 21st birthday, or as shortly thereafter as practicable, without taking any further written or physical tests***." The language in the Schedule was mandatory. Under those circumstances, appellant acquired tenure and a property right in his position (Board of Regents v. Roth, 408 U.S. 546, and Perry v. Sinderman, 408 U.S. 593).

An agency may not violate its own Rules and Regulations. Where an agency fails to comply with its own Regulations any adverse action taken thereon is invalid (Service v. Dulles, 354 U.S. 363; Watson v. U.S., 355 U.S. 14; Daub v. U.S., 292 F. 2d 895; Newman v. U.S., 143 Ct. Cl. 785, and Smith v. U.S., 151 Ct. Cl. 205). This is merely another application of the basic principle that separations and other adverse actions made in a manner which do not conform with the requirements of a valid agency rule or regulation are not lawful (Starzec v. U.S., 145 Ct. Cl. 25, and Washington v. U. S., 147 F. Supp. 284).

The Federal Courts at all levels are now enjoying tremendous prestige and respect. The exalted status of the Federal judicial structure does not exist merely because it has exclusive jurisdiction in bankruptcy, admiralty, patents and copyrights. Its stature has grown because its Judges have not hesitated to step in and assume jurisdiction of matters which years ago would have been considered exclusively within the domain of the State Courts (Lombard v. The Board of Education, etc., (supra); Birnbaum v. Trussell, 371 F. 2d 672; Roe v. Ingraham, 480 F. 2d 102; McMillan v. Board of Education, 430 F. 2d 1145; McClendon v. Rosetti, 460 F. 2d 111; Muhammad Ali v. Division of State Athletic Commission, 316 F. Supp. 1246; Bruns v. Pomerleau, 319 F. Supp. 58; The Vulcan Society of New York, et al., v. Civil Service Commission of the City of New York, 360 F. Supp. 1265, aff'd 490 F. 2d 387; Royster v. McGinnis, 327 F. Supp. 1318; Carr v. Thompson, 384 F. Supp. 544; Guardians Association of New York City Police Department v. Civil Service Commission, 490 F. 2d 400; Kirkland v. New York State Department of Correctional Services, 374 F. Supp. 1361, and Chance v. Board of Examiners, 458 F. 2d 1167).

Judge WERKER made a finding "that plaintiff had been dismissed because while still a trainee he had put a revolver to his head in an apparent suicide attempt" (149a-150a).

Putting aside the fact that Judge WERKER was in error in premising his finding on Captain HAMILTON's testimony which the latter gleaned from appellant's Police personnel folder, the fact is that defendant Police Department did make its records available to Captain HAMILTON, despite the Police Department witness O'BRIEN's testimony that Penn Central would not have been permitted to see Police Department records since it was not a Government agency (135a). Concededly, appellant was requested to and did execute an authorization which permitted Penn Central to inspect his Police personnel folder. He had no choice. Had he refused, he would not have been considered for appointment. As for public agencies, City, State or Federal, written authorization from appellant was unnecessary. On p. 131a, the witness O'BRIEN testifed as follows:

> "Q Do they have to have an authorization to obtain that information?
>
> A Not if it is a Government police agency."

It was incumbent upon appellant in all of the applications which he filled out for employment, civil service or in private sector, to set forth his more than three years of continuous service with the Police Department. Civil service application forms are all acknowledged. Had appellant failed to disclose his dismissal from the Police Department or lied with respect to said employment, he would have been subject to a

perjury charge. Appellant, however, disclosed his employment with the Police Department and his dismissal.

Upon the trial below, appellant was unable to demonstrate the number of Government agencies which inspected and reviewed his Police personnel folder. If such records were kept, then the Police Department would be the only one in a position to know. In any event, what Government law enforcement agency requiring the incumbent to carry a firearm would hire or appoint appellant under the circumstances disclosed? What Government agency would hire appellant in any responsible position? The accusation that a young male twenty-three years of age has suicidal tendencies is a serious charge. To the average layman, it betokens a mental aberrancy. Such an individual is ill and would in all probability erupt under tension, stress and anxiety.

Appellant was never made aware of such a serious allegation. He was never given an opportunity to confront and cross-examine the accuser. Since the alleged incident occurred at the Police Academy and "four or five individuals" were involved (117a), appellant should have been given an opportunity to explain. It might all have been a mistake. It could also have been a little horseplay. In any event, considering that several others were involved while at the Academy, what disposition, if any, was made with respect to the others?

Appellant, a young man twenty-three years of age, should not be compelled to go through the rest of his life carrying the stigma of a suicidal individual, without a hearing and the right of confrontation and cross-examination. The trial before Judge WERKER only emphasized the need and necessity for a hearing at the Police Department level so that all records and reports would be made available and the four or five other individuals alleged to have been present would be produced.

C O N C L U S I O N

THE DISMISSAL OF APPELLANT WAS ILLEGAL AND IMPROPER AS A MATTER OF LAW, THE ORDER AND JUDGMENT BELOW SHOULD BE REVERSED AND A WRIT OF MANDAMUS SHOULD ISSUE DIRECTING DEFENDANTS-APPELLEES TO REINSTATE APPELLANT TO HIS QUONDAM POSITION OF PATROLMAN, POLICE DEPARTMENT, CITY OF NEW YORK.

DATED: New York, March 10, 1975

Respectfully submitted,

SAMUEL RESNICOFF, Esq.,
Attorney for Plaintiff-Appellant.

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~~THREE~~ COPIES OF THE WITHIN PAPER
HAVE THIS DAY BEEN RECEIVED AT THE
OFFICE OF THE CORPORATION COUNSEL

MAR 10- 1975

CORPORATION COUNSEL